STATE OF MICHIGAN

COURT OF APPEALS

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP,

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, and THE DETROIT EDISON COMPANY,

Appellees/Cross-Appellees,

and

ATTORNEY GENERAL, STATE OF MICHIGAN, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, RESIDENTIAL RATEPAYERS CONSORTIUM, MICHIGAN POWER LIMITED PARTNERSHIP, ENERGY MICHIGAN, MICHIGAN COMMUNITY ACTION, INDIANA MICHIGAN POWER COMPANY, DOW CHEMICAL COMPANY, MICHIGAN ELECTRIC COOP, and NORTH AMERICAN NATURAL RESOURCES, INC.,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY, MICHIGAN SOUTH CENTRAL POWER AGENCY, and THE CITY OF DETROIT

Cross-Appellants.

UNPUBLISHED
June 9, 2000

No. 209549
MPSC
LC Nos. 011290, 011451, 011452, 011453, 011454

ATTORNEY GENERAL, STATE OF MICHIGAN,

Appellant/Cross-Appellee,

v

No. 209550
MPSC
LC Nos. 011290, 011449, 011451, 011452, 011453, 011454

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, and THE DETROIT EDISON COMPANY,

Appellees/Cross-Appellees,

and

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, RESIDENTIAL RATEPAYERS CONSORTIUM, MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP, MICHIGAN COMMUNITY ACTION, INDIANA MICHIGAN POWER COMPANY, MICHIGAN POWER LIMITED PARTNERSHIP, DOW CHEMICAL COMPANY, MICHIGAN ELECTRIC COOP, and NORTH AMERICAN NATURAL RESOURCES, INC.,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY,

Cross-Appellant.

NORTH AMERICAN NATURAL RESOURCES, INC.,

Appellant/Cross-Appellee,

v

No. 209560
MPSC
LC Nos. 011290, 011449, 011451, 011452, 011453, 011454, 011456

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, and THE DETROIT EDISON COMPANY,

Appellees/Cross-Appellees,

and

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, ATTORNEY GENERAL, STATE OF MICHIGAN, RESIDENTIAL RATEPAYERS CONSORTIUM, MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP, ENERGY MICHIGAN, MICHIGAN COMMUNITY ACTION, INDIANA MICHIGAN POWER COMPANY, and MICHIGAN ELECTRIC COOP,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY,

Cross-Appellant.

MICHIGAN POWER LIMITED PARTNERSHIP,

Appellant/Cross-Appellee,

v

No. 209578
MPSC
LC Nos. 011290, 011451, 011453, 011454

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, and THE DETROIT EDISON COMPANY,

Appellees/Cross-Appellees,

and

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, ATTORNEY GENERAL, STATE OF MICHIGAN, RESIDENTIAL RATEPAYERS CONSORTIUM, MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP, MICHIGAN COMMUNITY ACTION, INDIANA MICHIGAN POWER COMPANY, MICHIGAN ELECTRIC COOP, and NORTH AMERICAN NATURAL RESOURCES, INC.,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY,

Cross-Appellant.

RESIDENTIAL RATEPAYERS CONSORTIUM,

Appellant/Cross-Appellee,

v

No. 209579
MPSC
LC Nos. 011290, 011449, 011453

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, and THE DETROIT EDISON COMPANY,

Appellees/Cross-Appellees,

and

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, MICHIGAN POWER LIMITED PARTNERSHIP, MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP, ENERGY MICHIGAN, INDIANA MICHIGAN POWER COMPANY, DOW CHEMICAL COMPANY, MICHIGAN ELECTRIC COOP, and NORTH AMERICAN NATURAL RESOURCES, INC.,

Appellees,

and

MICHIGAN PUBLIC POWER AGENCY,

Cross-Appellant.

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

I. Facts

In these five consolidated appeals[1] filed by Midland Cogeneration Venture Limited Partnership (MCV), the Attorney General (AG), North American Natural Resources, Inc., Michigan Power Limited Partnership, and Residential Ratepayers Consortium (RRC), and cross-appeals, appellants challenge a series of orders entered by the Michigan Public Service Commission (PSC) restructuring the electric utility industry in Michigan to provide for the separation or "unbundling" of electric power/energy and transmission/distribution services. We affirm in part and reverse in part.

In 1995 the PSC ordered the implementation of a retail wheeling program in Michigan on a limited, experimental basis. The term "retail wheeling" refers to a local utility's delivery of power to a customer, also known as an "end-user," in its service area. Retail wheeling differs from traditional electric service in that the customer makes arrangements for the purchase of power from another company, also known as a "third-party provider." That power is transmitted to the customer through the local utility's system.

While the PSC's initial order implementing retail wheeling was on appeal, the PSC conducted further proceedings and issued further orders. The PSC Staff outlined a proposed framework for restructuring the electric utility industry to provide for retail wheeling. After holding public hearings, the PSC adopted in part and modified in part the Staff recommendation on industry restructuring. The PSC ordered a gradual transition to full retail wheeling over a five-year period, requiring Consumers Energy Company (CE) and The Detroit Edison Company (DE) to increase their retail wheeling service periodically until the year 2002, at which time all of the utilities' retail customers would be eligible for the service. All third-party power suppliers whose electricity would be wheeled by the utilities would be required to provide reciprocal transmission service in their own territories. The PSC's order also provided for CE and DE to recover their so-called "stranded" costs resulting from the industry restructuring. Temporary surcharges, chargeable to customers receiving retail wheeling service through December 31, 2007, were established to recover stranded costs.

Thereafter, the PSC initiated various contested cases to address the utilities' proposals for implementing retail wheeling. The PSC then issued a series of orders adopting with modification the utilities' revised retail wheeling tariffs, adopting a "true-up" mechanism, i.e., a mechanism for adjusting

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[1] Originally, this Court consolidated nine separate appeals in this matter. However, on July 1, 1999, this Court unconsolidated and dismissed three appeals filed by Detroit Edison company (Docket Nos. 204489, 209185, and 209900), pursuant to Detroit Edison's motion for voluntary dismissal. On October 29, 1999 this Court unconsolidated and dismissed the principal appeal filed by Consumers Energy Company pursuant to Consumers' motion for voluntary dismissal. The issues that Detroit Edison and Consumers Energy had raised are still before the court in the appeal filed by the Michigan Attorney General.

for differences between estimated and actual market prices for power, applicable to stranded cost recoveries, and granting the utilities' requests to suspend their power supply cost recovery (PSCR) clauses in their existing rates. Subsequently, the PSC issued orders responding to motions for rehearing and clarification.

In *In re Retail Wheeling Tariffs*, 227 Mich App 442; 575 NW2d 808 (1998), another panel of this Court affirmed the PSC's initial order implementing an experimental retail wheeling program. We held that the PSC had the statutory authority to implement the program, and that the PSC's order did not infringe on the right of the utilities to control their management activities.

After briefs were filed in the instant appeals, the Supreme Court decided *Consumers Power Co v Public Service Comm*, 460 Mich 148; 596 NW2d 126 (1999), in which it reversed our decision in *In re Retail Wheeling Tariffs*, *supra*. The Supreme Court held that the PSC's statutory authority to regulate rates and charges of utilities does not encompass the power to make management decisions. The decision to provide retail wheeling is a managerial decision; thus, the PSC has no authority to require the implementation of a retail wheeling program. *Id*. at 168. The decision did not determine whether the PSC has the authority to regulate retail wheeling programs which utilities adopt on a voluntary basis.

Following the Supreme Court's decision, the PSC requested that the parties submit briefs explaining the effect of the decision on the restructuring orders at issue in these appeals. The AG filed a motion for remand in the instant appeals, arguing that the PSC had no authority to reconsider its restructuring orders in light of the Supreme Court's decision, unless and until we remanded the cases to the PSC. We denied the AG's motion to remand. The PSC issued an order reasoning that while the Supreme Court's decision in *Consumers Power, supra*, 460 Mich 148, prohibited the mandating of retail wheeling programs, it did not prohibit the regulation of such programs offered on a voluntary basis. An appeal of that order is currently pending before this Court.

II. Analysis

All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC bears the burden of establishing by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8). A final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. The substantial evidence standard of review does not apply to those aspects of a PSC order which involve a legislative, policy-making decision rather than an adjudication of disputed issues of fact. *Consumers Power Co v Public Service Comm*, 226 Mich App 12, 21, 32; 572 NW2d 222 (1997). We defer to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney General v Public Service Comm*, 206 Mich App 290, 294; 520 NW2d 636 (1994).

Statutory interpretation is a question of law subject to de novo review. Generally, we will defer to the construction placed on a statute by the governmental agency charged with interpreting it, unless the agency interpretation is clearly erroneous. However, merely establishing that another interpretation of a statute is plausible does not satisfy a party's burden of proving by clear and convincing evidence that the PSC's interpretation is unlawful or unreasonable. *In re MCI Telecommunications Complaint*, 229 Mich App 664, 681-682; 583 NW2d 458 (1998), aff'd in part and rev'd in part 460 Mich 396; 596 NW2d 164 (1999); *Attorney General v Public Service Comm*, 227 Mich App 148, 155; 575 NW2d 302 (1997).

The issues raised in the principal appeals and the cross-appeals can be grouped into four categories: (1) challenges to the PSC's decision mandating a transition to retail wheeling unbundling of electricity services; (2) challenges to the PSC's suspension of the utilities' PSCR clauses as part of the transition process; (3) challenges by the qualifying facilities (QFs) to the December 31, 2007 cut-off date established by the PSC for the recovery of certain power costs as part of the stranded costs resulting from the transition; and (4) miscellaneous matters.

1. Transition to Retail Wheeling

The issue of the PSC's authority to mandate the implementation of a retail wheeling program was decided by the Supreme Court in *Consumers Power, supra, 460 Mich 184*. Thus, those issues in the instant appeals challenging the PSC's authority in this regard require little discussion. The Supreme Court concluded that because the decision to provide retail wheeling service is a managerial decision, and because the PSC's statutory authority to regulate rates and charges does not include the power to make management decisions, the PSC was without authority to mandate the implementation of a retail wheeling program, even on a limited, experimental basis. *Id.* at 157-159. Therefore, the PSC was without the statutory authority to order restructuring of the electric industry to accommodate retail wheeling. Accordingly, we reverse the PSC's orders to the extent that those orders require utilities to provide retail wheeling service and mandate restructuring of the electric industry to provide for retail wheeling. We note that in its order issued after the decision in *Consumers Power, supra*, 460 Mich 184, the PSC acknowledged that it could not require utilities to provide retail wheeling.

In light of the Supreme Court's decision in *Consumers Power, supra*, 460 Mich 148, we deem it unnecessary to reach appellants' remaining issues challenging the PSC's authority to mandate retail wheeling on other grounds.

2. PSCR Clause Suspension

Initially, the AG, RRC, and cross-appellants argue that the PSC lacked express or implied authority to suspend PSCR clauses previously implemented under MCL 460.6j(2); MSA 22.13(6j)(2). We disagree. In *Attorney General v Public Service Comm*, 231 Mich App 76; 585 NW2d 310 (1998) (hereinafter referred to as "*Northern States*"), another panel of this Court held that the authority to temporarily suspend PSCR clauses is implicit in the PSC's authority under MCL 460.6j; MSA 22.13(6j) to incorporate PSCR clauses. *Northern States, supra* at 78-80. The Supreme Court has repeatedly held that the statutory authority of administrative boards and commissions such as

the PSC may be established by necessary or fair implication. See, e.g., *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 147; 428 NW2d 322 (1988). *Northern States*, *supra*, is consistent with this authority; thus, we decline the AG's invitation to invoke the conflicts rule. MCR 7.215(H).

Furthermore, while the PSC noted that suspending the utilities' PSCR clauses during the transition to retail wheeling would protect ratepayers in the event of a power supply cost increase, the PSC rejected the argument that PSCR clauses can be suspended only if the evidence established that rates would be lower than if the clauses remained in place. The PSC may suspend a PSCR clause without conducting a contested case hearing if the suspension does not result in a rate increase. *Northern States*, *supra* at 81-82. Indeed, if the potential loss of a rate decrease is insufficient to require the PSC to conduct an evidentiary hearing before suspending a PSCR, *id.*, it follows that evidence that suspending a PSCR clause will not result in the loss of a future rate decrease is not required for the PSC to suspend a PSCR clause.

Moreover, contrary to the AG's assertion, the PSC's decision to grant rehearing relief and change the threshold for implementation of the PSCR clause suspensions, and its subsequent decision to accept CE's immediate PSCR suspension proposal, was not based upon mere reconsideration of arguments previously addressed and rejected. The PSC has "full power and authority to grant rehearings and to alter, amend or modify its findings and orders." MCL 460.351; MSA 22.111. The decision to change the threshold for implementing the PSCR clause suspensions was based on changes in the certainty of the utilities' retail wheeling access transition schedules. The decision to adopt CE's new proposal for an immediate suspension of its PSCR clause was made in light of new authority from this Court holding that MCL 460.6j(2); MSA 22.13(6j)(2) does not require the holding of a contested case hearing when the suspension would not result in a rate increase. *Northern States*, *supra* at 81. The PSC did not abuse its discretion or act unreasonably or unlawfully by granting rehearing relief.

Next, we hold that annual reconciliations of power supply costs and revenues under 1982 PA 302 are not required after a utility's PSCR clause has been suspended. MCL 460.6k(3); MSA 22.13(6k)(3) provides that a utility's power supply costs are subject to annual reconciliation; however, MCL 460.6k(1); MSA 22.13(6k)(1) specifically provides that the section governs the "initial filing and implementation" of a PSCR plan. We defer to the PSC's interpretation and application of MCL 460.6k; MSA 22.13(6k), and decline to conclude that the PSC's decision was unlawful or unreasonable simply because the statute is subject to another plausible interpretation. *Attorney General*, *supra*, 227 Mich App at 155.

Finally, we conclude that the AG's argument that the PSC's decision to suspend DE's PSCR clause constituted an unlawful modification of prior settlement agreements affecting the PSCR clause is moot. DE has indicated that it no longer desires suspension of the PSCR clause, and has requested that the PSC vacate its suspension order.

3. Stranded Cost Recovery

Various appellants argue that by establishing a December 31, 2007 cut-off date for recovery of stranded costs, including QF capacity costs arising under CE's thirty-five year power purchase

agreement with MCV, the PSC failed to specifically provide for the recovery of previously approved capacity costs after December 31, 2007. Appellants assert that this failure violates the PSC's previous orders in other proceedings, which approved recovery of costs arising over the entire term of the agreement between CE and MCV. Appellants contend that to the extent that the PSC has restricted recovery of costs after 2007, it has violated the prohibition in 1981 PA 81 against reconsideration of approved QF capacity charges during the first seventeen and one-half years of the power purchase agreement.

These issues are not ripe for appellate review. In an order responding to motions for clarification, the PSC specifically reiterated that it was not modifying previously approved capacity charges, or otherwise affecting the rights of QFs under existing contracts. Even assuming arguendo that the PSC's statement that utilities could "seek" recovery of costs after 2007 could be interpreted as suggesting that some costs might be disallowed, such a ruling would constitute mere speculative dicta that is not subject to judicial review. *Attorney General v Public Service Comm*, 235 Mich App 308, 316-317; 597 NW2d 264 (1999). No unequivocal disallowance of any costs has been made. Cf. *ABATE v Public Service Comm*, 219 Mich App 653, 662-663; 557 NW2d 918 (1996). Moreover, in a subsequent order, the PSC acknowledged the decision of the United States District Court for the Western District of Michigan in *North American Natural Resources, Inc, et al v Michigan Public Service Comm*, Case No. 5:98-CV-22, which prohibited the PSC from enforcing portions of its restructuring orders in a manner contrary to the requirements of the Public Utility Regulatory Policies Act of 1978, 15 USC 3201 *et seq*. The PSC emphasized that it would comply with the federal court decision, but correctly noted that no actual controversy regarding recovery of costs could occur until the year 2008 at the earliest.

4. Miscellaneous Issues

The AG argues that the PSC lacks the power to authorize CE and DE to recover stranded costs because no statute specifically grants such power. We disagree. No statute expressly authorizes the recovery of costs that have become stranded due to regulatory changes; however, the Legislature has broadly authorized the PSC to consider all relevant factors in determining rates. Such factors may include the cost of a utility's prudent expenditures and investments which later prove to be unusable or obsolete. The recovery of costs need not be contemporaneous with the period in which the expenditures are made. *ABATE v Public Service Comm*, 208 Mich App 248, 258-260; 527 NW2d 533 (1994).

Next, the AG argues that the PSC's reciprocity requirement imposed on competitors for retail wheeling transmission customers is unlawful as an impermissible burden on interstate commerce. This issue is rendered moot by our reversal of those portions of the PSC's orders which mandate restructuring of the electricity utility industry. The federal commerce clause, US Const, art 1, § 8, cl. 3, is a restraint on state action, and is not implicated in private, voluntary action not mandated by state law. Therefore, if utilities, acting on a private, voluntary basis, condition retail wheeling on reciprocity, the commerce clause is not violated.

Finally, cross-appellants argue that the PSC acted unlawfully by failing to conduct earlier proceedings in accordance with the Administrative Procedures Act, MCL 24.201 *et seq*.; MSA 3.560(101) *et seq*., and then making substantive decisions affecting industry reform based on those earlier, defective proceedings. We disagree. A contested case hearing is not required when the PSC merely creates a framework for deciding matters in future contested case proceedings. *Attorney General*, *supra*, 227 Mich App at 148.

We reverse those portions of the PSC's orders that mandate restructuring of the electric utility industry to accommodate retail wheeling, but hold that the remaining aspects of the restructuring program, i.e., PSCR suspension and stranded cost recovery, can be applied to any retail wheeling activity in which the utilities voluntarily decide to engage. In all other respects, the PSC's orders are affirmed.

Affirmed in part and reversed in part.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins